Central Law Journal.

ST. LOUIS, MO., JULY 4, 1919.

MEANING OF THE PHRASE, "RIGHTS OF EX-TERRITORIALITY."

It is dangerous to use phrases not clearly defined in the law. In many treaties with semi-barbarous states the citizens of more civilized states are frequently given "rights of exterritoriality." Usually, in diplomatic circles this means that the citizen, in whose favor such a right is given, is subject in all respects to the law of his nationality.

A number of recent cases have arisen in England with respect to the title to real property of Englishmen in Zanzibar, Egypt, and other semi-autonomous states. The question in all these cases is: Shall the title be construed according to the law of the place where the land is situated or according to the law of England? A decision of the Privy Council rendered in 1901 (Secretary of State v. Charlesworth, 84 L. T. Rep. 212, 1901 A. C. 373) seems to be opposed by the lawyers and law journals of England and they are asking the courts not to follow it.

In the Charlesworth case the court was called upon to decide conflicting claims to certain lands in Mombasa (part of Zanzibar). The treaty gave citizens of England the "right of exterritoriality," which one of the parties contended made the law of England applicable. The Judicial Committee agreed to this contention, but to the surprise and chagrin of the defeated litigant, who had advanced the suggestion in his own favor, held that this view made the law of Zanzibar the law in the case. In view of the fact that English law must govern under the treaty, argues the Privy Council, and since it is a principle of British law that all rights connected with property in land are governed by the *lex situs*, therefore, under British law, the law of Zanzibar must control.

A recent issue of the Law Times (146 L. T. 2) makes a sharp attack upon this case—a sort of "barrage" preparation for a reconsideration of the question in other cases likely soon to come before the higher courts. "The sum and substance of this decision," says the Times, "is that when a British subject owns land in a Mahomedan country, and has by treaty "exterritorial rights" in regard to his property, his rights in his land are governed by Mahomedan law. The effect of construing the rule as to *lex situs* to mean that the land is governed by the local Mahomedan law is to nullify *pro tanto* the grant of treaty rights."

After showing the serious effect of this decision by a reference to other cases under other treaties the Times offers a direct suggestion to attorneys to revolt, saying: "There would seem to be fair grounds for any tribunal, on which the decision in *Secretary of State v. Charlesworth*, was not technically binding, declining to follow it. The law laid down is certainly inconvenient and likely to result in defeating the intentions of testators and others. An owner of land in a Mahomedan country, knowing that his property rights are in general governed by English law, may well make a will in English form that will ultimately turn out to be invalid. This has indeed actually happened."

The Charlesworth case has been followed in Re Grant (1908), a case of intestacy. In this case the court held that since English law recognized the rule that interstate rights in land are governed by the *lex situs*, the persons entitled to the land of the deceased located in Egypt were those who were his heirs according to the Mohammedan law. This decision was severely criticized in 20 Juridical Review 47.

The effect of this criticism has led to some modification of the rule in the Charlesworth case, and it has been held that a will devising lands in Egypt will be construed according to the law of England. Re Dale

120 L. T. 12. Such an exception seems to be clearly illogical and evidences an admission by the English courts that the decision in the Charlesworth case was wrong.

The fundamental principle of private international law is that the law of the *situs* of the transaction not that of the *situs* of the property governs. If the transaction is voluntary, as a sale, the place where the transaction occurs will govern. If the transfer is involuntary or by operation of law as in the case of intestate succession, the law of the domicile will govern. The *lex situs* of the property governs only as to real property and is an exception based on the necessities of the case. It is a rule of expediency not of logic. It would be impossible for foreign courts to make effective their decrees relative to title to land. This fact, together with the desire to respect the territorial sovereignty of every state, is probably the underlying reason for the decision in the Charlesworth case. It is probable, however, the rule will be confined to actual transfers of title by deed and by operation of law. In such cases it is not too much to require those who purchase land in semi-civilized countries to hold and dispose of it according to the forms and customs recognized in such communities.

NOTES OF IMPORTANT DECISIONS.

LIABILITY OF ALIENS TO PAY INCOME TAX ON SECURITIES PLACED IN HANDS OF A RESIDENT AGENT.—The following question was recently certified to the Supreme Court of the United States by the Circuit Court of Appeals (3d Cir.):

"If an alien non-resident owns stocks, bonds and mortgages secured upon property in the United States or payable by persons or corporations there domiciled, and if the income therefrom is collected for and remitted to such non-resident by an agent domiciled in the United States, and if the agent has physical possession of the certificates of stock, the bonds and the mortgages, is such income subject to an income tax under the Act of October 3, 1913?"

The statute provides for a levy of an income tax upon the net income "from all property owned" in the United States by persons residing elsewhere. In the present case (De Ganay v. Lederer, not yet reported), plaintiff was a citizen of France, who inherited the property in question, bonds and stocks, from her father. Plaintiff made the Pennsylvania Company for Assurances her agent to collect and remit to her the income from this property. The Supreme Court in holding this property to be taxable, said:

"We have no doubt that the securities herein involved are property. Are they property within the United States? It is insisted that the maxim *mobilia sequuntur personam* applies in this instance, and that the *situs* of the property was at the domicile of the owner in France. But this court has frequently declared that the maxim, a fiction, at most, must yield to the facts and circustances of cases which require it, and that notes, bonds and mortgages may acquire a *situs* at a place other than the domicile of the owner, and be there reached by the taxing authority.

"In the case under consideration the stocks and bonds were those of corporations organized under the laws of the United States, and the bonds and mortgages were secured upon property in Pennsylvania. The certificates of stock, the bonds and mortgages were in the Pennsylvania Company's offices in Philadelphia. Not only is this so, but the stocks, bonds and mortgages were held under a power of attorney which gave authority to the agent to sell, assign or transfer any of them, and to invest and reinvest the proceds of such sales as it might deem best in the management of the business and affairs of the principal. It is difficult to conceive how property could be more completely localized in the United States."

IS THE EXPENSE OF A TOMBSTONE TO BE INCLUDED AMONG FUNERAL EXPENSES?—There is discussion in English law journals of the recent case of Goldstein v. Salvation Army Assurance Society, 117 L. T. Rep. 63. The law in England provides that industrial insurance companies may issue policies for certain purposes only, among which are "funeral expenses." The question in the Goldstein case was whether this term included the erection of a tombstone.. The court, ignoring certain prior decisions in England held that "funeral expenses did not, as a matter of law,

exclude the cost of a tombstone, and that it was a question of fact, in each particular case, whether such an expense was recoverable. Mr. Justice Rowlatt, in the course of his judgment, while admitting that a tombstone, like mourning, is not allowed as part of the funeral expenses which are deducted in estimating estate duty, said: 'The memorial upon a grave may be the completion and identification of the grave itself, and, while I do not say that in every case a tombstone must be part of the funeral expenses, I do not say as a matter of fact that it is not.'"

This ruling and the discussion of it seems strange to lawyers in the United States, where the rule is that the erection of a tombstone, not incommensurate in value to the amount of the estate, will be regarded as part of the "funeral expenses" and subject to the same rule. A simple marker to identify the grave would seem to be as indispensable to the respectable interment of the deceased as a coffin or an undertaker, and the expense for such marker will be allowed even where the estate is insolvent. Schouler on Executors (5th Ed.), p. 1479, note 8). But when the monument is more than a mere "marker," the personal representative will not usually be allowed the expense if the estate is insolvent. But where creditors and other claims are satisfied in full, legatees and distributees cannot object to a monument if the amount is not unreasonable compared to the value of the estate. Lund v. Lund, 41 N. H. 355; Webb's Estate, 765 Pa. St. 330, 44 Am. Rep. 666.

Usually the executor does not take the responsibility to erect other than a modest marker on the grave; if the relatives of deceased desire something more expensive, they are asked to stand the expense and present their claim for allowance. The personal representative would not be safe in going to any large expense for a tombstone, even in a solvent estate, without the previous consent of heirs or residuary legatees.

The essential thing, however, is that in America the rule is, according to Mr. Schouler (supra) "in general, the cost of erecting a headstone at the grave may be allowed to the representative as funeral expenses but only to the extent of providing for a decent burial, according to the amount of the estate."

AMENDMENT OF WRIT OF PROCESS AND OF RETURN OF SERVICE THEREON.[1]

1.—*In general.* In the following discussion the fundmental principle that an *actual* service of process in one of the manners provided by the statute of the forum, a voluntary appearance, or a waiver of the issuance and service of process, is indispensably necessary to the jurisdiction of the court over the person of the defendant, is assumed without the citation of the many decisions which so hold.

It may be laid down as a general principle, to start with, that a jurisdictional process, commencing an action, cannot be amended in any substantial particular, without a statute of amendments especially authorizing it.[2] In California, by statutory provision,[3] the process of the court is within its power and may be amended at any time pending service, where there is an otherwise valid process to amend,[4] and where the process of the court is amendable it will be accorded the same effect, in so far as acts done in serving it are concerned, as though it had been amended.[5] Under a statute[6] conferring on the courts control over their process, and power to amend the same to conform to law and justice, after service and return of a summons, the court may order the writ of process to be amended so as to conform with the requirements of the statute,[7] and may order the process as thus amended to be withdrawn from the

(1) Copyright, and all rights, reserved, by James M. Kerr.

(2) Fisher v. Crowley, 57 W. Va. 312, 50 S. E. 422.

(3) See Kerr's Cyc. Cal. Code Civ. Proc., § 128, par. 8.

(4) See Kerr's Pleading and Practice, § 143.

(5) Brann v. Blum, 138 Cal. 644, 72 Pac. 168.

(6) As California Code Civ. Proc., § 128, par. 8; Idaho Rev. Stats. 1887, § 3862; New York Code Civ. Proc., § 722, and similar statutes.

(7) Empire Mill Co. v. District Court, 27 Idaho 383, 149 Pac. 499; Empire Mill Co. v. District Court, 27 Idaho 400, 149 Pac. 505.

May be amended on notice after service and after defendant's default.—Sage Inv. Co. v. Haley, 59 Colo. 504, 149 Pac. 437; Gensler v. Nicholas, 151 Mich. 529, 115 N. W. 458.

files and reserved;[8] and it has been held that the trial court may permit the process and the complaint to be so amended as to show that the defendant is sued in his individual instead of in his representative capacity,[9] or amended by eliminating one plaintiff where there are two distinct causes of action set forth in favor of different plaintiffs against the same defendant,[10]—e. g., where a husband and wife are joined in an action in a personal injury case, one cause of action setting out the rights of the husband to recover and the other setting out the right of the wife to recover for the same injury; but a void jurisdictional process cannot be amended by an order of the trial court.[11] Thus, a writ of process without the seal of the court attached is utterly void, and cannot be amended, the seal being a constitutional requisite;[12] but whether a summons, served without the clerk's signature being attached to the process, can be amended or not is a question upon which the decisions are not harmonious, and the practitioner will have to adhere to the rule announced by the courts in his particular jurisdiction. Some of the decisions maintain that a summons without the signature of the clerk of the court[13] is absolutely void and unamendable,[14] while in other jurisdictions a summons otherwise regular in form and sufficient in matter, not signed by the clerk, is not void, and the defect may be corrected by amendment after service and return thereon.[15]

2.—*A mere clerical error,* apparent from the face of the record, such as a mistake in the date of the return day,[16] for the sheriff, or the answer day for the defendant, may be corrected by amendment by the court at any time,[17] even though an objection to the jurisdiction of the court, based on the defect, has been taken and is at the time pending for hearing,[18] But where a defendant is served under a wrong name, an amendment of the summons, after service and return, by substituting his correct name, will not confer jurisdiction on the court over the person of the defendant.[19]

3.—*Amendment to Return of Service of Process—In General.*—To support a judgment by default against a person named as a defendant who has not appeared and answered, there must have been not only a legal and sufficient service of process upon

(8) Ridenbaugh v. Sandlin, 14 Idaho 472, 478, 94 Pac. 827; Hancock v. Preuss, 40 Cal. 572; Richmond & D. R. Co. v. Benson, 86 Ga. 203, 12 S. E. 357; Passumpsic Sav. Bank v. Manlick, 60 Nev. 469, 83 N. W. 672; Coffin v. Bell, 22 Nev. 169, 37 Pac. 240; Simmons v. Norfolk & B. Steamboat Co., 113 N. C. 147, 18 S. E. 117; Miller v. Zeigler, 44 W. Va. 484, 29 S. E. 981.

(9) Boyd v. United States Mortgage & T. Co., 187 N. Y. 262, 79 N. E. 999.

(10) Georgia Railroad & Banking Co. v. Tice, 124 Ga. 459, 52 S. E. 916.

(11) Durham v. Heaton, 28 Ill. 264; Sharman v. Huot, 20 Mont. 555, 52 Pac. 558. See, also, Kerr's Pleading and Practice, § 143.

(12) Gordon v. Bodwell, 59 Kan. 51, 346, 51 Pac. 906. See Kerr's Pleading and Practice, § 143.

(13) As to signature by clerk, see § 143.

(14) Sharman v. Huot, 20 Mont. 555, 645, 52 Pac. 558. See: Stone v. Harris, 1 Minor (Ala.) 32; Rattan v. Stone, 4 Ill. (3 Scam.) 540; Dwight v. Merritt, 18 Blatchf. 305, 4 Fed. 614; Seurer v. Horst, 31 Minn. 479, 18 N. W. 283; Cammon v. Perrine, 9 N. J. L. (4 Halst.) 253; Roberts v. Allman, 106 N. C. 391, 11 S. E. 424; Williamson v. McCormick, 126 Pa. St. 274, 17 Atl. 591; Hickman v. Larckey, 6 Graet. (Va.) 210; Laidley v. Bright, 17 W. Va. 778, 791-2; Fisher v. Crowley, 57 W. Va. 312, 50 S. E. 422.

(15) Aultman & Taylor Mach. Co. v Wier, 67 Kan. 674, 74 Pac. 227, approving and following Furman v. Easterly, 36 Kan. 539, 13 Pac. 824. See: Taylor v. Buck, 61 Kan. 694, 60 Pac. 736; Austin v. Lamar Fire Ins. Co., 108 Mass. 338; Pepoon v. Jenkins, 1 Colm. Cas. (N. Y.) 55, 1 Colm & C. Cas. 60; Ambler v. Leach, 15 W. Va. 677.

(16) Return-day for sheriff thirty days too long.—Alford v. Hoag, 8 Kan. App. 141, 54 Pac. 1105.

(17) Alford v. Hoag, 8 Kan. App. 131, 54 Pac. 1105; Barker Co. v. Western Inv. Co., 75 Neb. 43, 105 N. W. 985.

(18) "When the mistake in the date was called to the attention of the court by the motion to amend, the objection to the jurisdiction being still pending before the court, it was within the power and discretion of the court to permit the amendment to be made."—Barker Co. v. Western Inv. Co., 75 Neb. 43, 105 N. W. 985, citing Fisher v. Collins, 25 Ark. 97; Richmond & D. R. Co. v. Benson, 86 Ga. 203, 12 S. E. 357; Hamilton v. Ingraham, 121 Mass. 562; Kidd v. Dougherty, 50 Mich. 24, 26 N. W. 510; Kelly v. Harrison, 69 Miss. 856, 12 So. 261.

(19) Union Pac., D. & G. R. Co. v. Perkins, 7 Colo. App. 184, 42 Pac. 1047.

such defendant,[20] but a legal and sufficient return of service of process as well.[21] A return to a service of process is presumed to speak the truth as to the facts as they existed at the time of making the same,[22] relative to the acts of the officer serving the process, and whenever, by reason of clerical error or mistake or inadvertence, the return, as made, is erroneous as to the facts, it may be amended or corrected (1) by the officer before filing, without leave of the court, because until the return is actually filed in court it is under the absolute control of the officer making the service,[23] and (2) after filing of the return, by leave of court first obtained, on application of the officer,[24] even though application is made after the officer has gone out of office,[25] where the acts done by the officer and the service of the process were sufficient to give the court jurisdiction of the person of the defendant.[26] Applications to the trial court for leave to amend the return to the service of process, in order that such return may conform to the requirements of the law or to the facts in the case, are usually treated with liberality, so as to make the return correspond to the true state of facts,[27] although such amendments rest in

(20) Stubbs v. McGillis, 44 Colo. 138, 18 L. R. A. (N. S.) 405, 96 Pac. 1005; Albright-Pryor Co. v. Pacific Selling Co., 126 Ga. 498, 55 S. E. 251. See: Great Western Min. Co. v. Woodmas of Alston Min. Co., 14 Colo. 90, 23 Pac. 908; Du Bois v. Clark, 12 Colo. App. 220, 55 Pac. 750; Smith v. Morrill, 12 Colo. App. 233, 55 Pac. 824, Kelly v. East Side Imp. Co., 16 Colo. App. 365, 65 Pac. 456.

(21) Albright-Pryor Co. v. Pacific Selling Co., 126 Ga. 498, 55 S. E. 251. See Wood v. Galloway, 49 Ga. 801, 47 S. E. 178, and cases cited.

(22) Return presumed to be true, until the falsity of it be proved.—Purington v. Loring, 7 Mass. 388.

Presumption of service of process on foreign corporation does not arise from personal service of process within the state upon the president of the corporation, where such corporation confines its operations to the state creating it.—Knapp v. Wallace, 50 Ore. 348, 92 Pac. 1054.

Presumption does not apply to supply jurisdictional facts which the return of process must show.—Shenandoah Valley R. Co. v. Ashby's Trustees, 86 Va. 232, 9 S. E. 1003.

(23) Nelson v. Cook, 19 Ill. 440; Wilcox v. Moudy, 89 Ind. 232, 234; Welsh v. Joy, 30 Mass. (13 Pick.) 477; Watson v. Toms, 42 Mich. 561; Cochrane v. Johnson, 95 Mich. 67, 54 N. W. 707; Dixon v. White Sewing Mach. Co., 128 Pa. St. 397, 407, 18 Atl. 502; Miller v. Alexander, 13 Tex. 497, 65 Am. Dec. 78.

(24) Allison v. Thomas, 72 Cal. 562, 564, 14 Pac. 318; Newman, In re, 75 Cal. 213, 220, 16 Pac. 887 (amendment of affidavit of service by publication); Jones v. Gunn, 149 Cal. 687, 693, 87 Pac. 577, 579; Golden Paper Co. v. Clark, 3 Colo. 321; Jeffries v. Rudloff, 73 Iowa 60, 34 N. W. 756; Kirkwood v. Reedy, 10 Kan. 453; Wilkins v. Tourtelbott, 28 Kan. 825; Jordan v. Johnson, 1 Kan. App. 656, 42 Pac. 415; Hutchins v. Carver, 16 Minn. 13; Shufeldt v. Barlass, 33 Neb. 785, 51 N. W. 134; Elder v. Frevert, 18 Nev. 278, 3 Pac. 237; Green v. Cole, 55 N. C. (13 Ired. L.) 425; Mills v. Howland, 2 N. D. 30, 49 N. W. 413; Weaver v. Southern Oregon Co., 30 Ore. 348, 48 Pac. 171; Tilton v. Cofield, 93 U. S. 163, 167.

Amendment without leave of court, four months after decree based on service by publication wherein the affidavit of mailing was insufficient to confer jurisdiction on the court, the amendment consisting of a new affidavit of mailing, there being on file no affidavit showing facts upon which to base an order for amendment, such amended return is insufficient to confer jurisdiction on the court and validate the decree.—Knapp v. Wallace, 50 Ore. 348, 92 Pac. 1054.

(25) Pacific Postal Tel. Cable Co. v. Fleischner, 66 Fed. 899, 905. See, also, par. 9, footnotes 95 et. seq. and text, this article.

(26) Allison v. Thomas, 72 Cal. 562, 14 Pac. 318; Call v. Rocky Mountain Bell Tel. Co., 16 Idaho 556, 102 Pac. 146.

(27) See: Borland v. O'Neal, 22 Cal. 504; Gavitt v. Doub, 23 Cal. 78, 81; Rousset v. Boyle, 45 Cal. 64; Hewell v. Lane, 53 Cal. 217; Allison v. Thomas, 72 Cal. 562, 14 Pac. 309; People v. Goldenson, 76 Cal. 328, 345, 19 Pac. 161; Golden Paper Co. v. Clark, 3 Colo. 321; McClure v. Smith, 14 Colo. 297, 301, 23 Pac. 786; Irons v. Keystone Mfg. Co., 61 Iowa 406, 408, 16 N. W. 349; Stetson v. Freeman, 35 Kan. 528, 531, 11 Pac. 431; Berry v. Griffith, 1 Harris & G. 337, 18 Am. Dec. 309; Crocker v. Mann, 3 Mo. 472; Shufeldt v. Barlass, 33 Neb. 785, 51 N. W. 134; Wittstruck v. Temple, 58 Neb. 18, 78 N. W. 456; Parker v. Barker, 43 N. H. 35; Stealman v. Greenwood, 113 N. C. 355, 18 S. E. 503; Mills v. Howland, 2 N. D. 30, 49 N. W. 413; Weaver v. Southern Oregon Co., 33 Ore. 348, 48 Pac. 171; Com. v. Chauncey, 2 Ashm. (Pa.) 99; Dewar v. Spencer, 2 Whart. (Pa.) 211; Rudy v. Com., 35 Pa. St. 166; Shenandoah Valley R. Co. v. Ashby's Trustees, 86 Va. 232, 9 S. E. 1003; McCormick v. Southern Ex. Co., 93 S. E. 1048; Rickards v. Ladd, 6 Sawy. 40, 46, Fed. Cas. No. 11804.

Amendment to material fact in return, allowed when satisfactorily proved that the proposed recital in the amended return was a fact.—Chase v. Merrimac Bank, 36 Mass. (19 Pick.) 564.

Sheriff's duty to correct return so that it shall speak the truth.—Berry v. Griffith, 1 Harris & G. (Md.) 337.

Return by deputy-sheriff, not signed in sheriff's name is voidable, not void, and is amendable.—Dewar v. Spencer, 2 Whart. (Pa.) 211; Com. v. Chauncey, 2 Ashm. (Pa.) 99; Rudy v. Com., 35 Pa. St. 166, 168.

the sound judicial discretion of the trial court, and may be allowed or disallowed as may best tend to the furtherance of justice,[28] and will be denied where the proposed amendment will work injury.[29] Thus, in a recent case in California it was held that where an action is brought against fictitious persons, or against actual persons in fictitious names, service of process made on persons not named in the process or in the complaint, and judgment entered, by default, against the persons served, without amendment, it is the duty of the trial court, on motion of the plaintiff, to thereafter permit the return to the process to be so amended as to show that the persons served were the persons sued under the fictitious names.[30] But an amendment to a return to the service of process that may affect injuriously the rights of third persons, can be allowed only in those cases where there is something in the record by which the amendment or correction can be made.[31] An officer cannot be permitted to so amend a return to service of a process as to render it contrary to his former return on record,[32] or to contradict or invalidate such former return under oath.[33] An amendment to a return of process has reference to the state of facts at the time of service,[34] and relates back to and becomes a part of the original return, and may, for that reason, give validity to a judgment which, but for such amendment, would be treated as void.[35]

4.—*Defects jurisdictional.*[36] The court acquires no jurisdiction over the person of the defendant, and the return cannot be amended, even by permission and with the consent of the trial court,[37] because the court, not having acquired jurisdiction of the defendant, has no power to entertain or act on the application to amend,[38] further than to deny the application; and also for the further reason that there is nothing to amend, because the service of a process jurisdictionally defective, *e. g.*, where made out of the jurisdiction of the officer serving, is void.[39]

5.—*Limitation on Rule.* In most jurisdictions there is a limitation placed upon the general rule as to allowance of amendments to return of process, confining such amendments to the original parties to the action, and denying amendment in those cases in which the intervening interests of

(28) Jackson v. Esten, 83 Me. 162, 21 Atl. 830. See, also, cases in next footnote.

(29) Freeman v. Paul, 3 Me. (3 Greenl.) 260; Thatcher v. Miller, 13 Mass. 270; Kahn v. Mercantile Town Mut. Ins. Co., 228 Mo. 585, 128 S. W. 995; West Mountain Lime & Stone Co. v. Danley, 38 Utah 218, 111 Pac. 647.

Denial of amendment of return as to the name of the person served, is not an abuse of judicial discretion.—Stubbs v. McGillis, 44 Cal. 138, 96 Pac. 1005.

No rights of third persons having intervened, amendment may be allowed.—West Mountain Lime & Stone Co. v. Danley, 38 Utah 218, 111 Pac. 647.

(30) McGinn v. Rees, 33 Cal. App. 291, 165 Pac. 52, citing Herman v. Santee, 103 Cal. 519, 37 Pac. 509; Morrissey v. Gray, 160 Cal. 390, 117 Pac. 438. But in discussion and authorities, paragraph numbered 6, this article.

Criticism of Morrissey v. Gray in paragraph numbered 8, this article.

(31) Fairfield v. Paine, 23 Me. 498.

As to limitation on rule as to amendments where intervening rights of third persons are adversely affected, see, post, par. 5.

Must appear upon face of writ or return that the proposed amendment would be proper.—Parker v. Barker, 43 N. H. 35.

(32) Wyer v. Andrews, 13 Me. 168.

(33) Id.

(34) Malone v. Samuel, 10 Ky. (3 A. K. Marsh) 350.

(35) Woodward v. Harbin, 4 Ala. 534; Kahn v. Mercantile Town Mut. Ins. Co., 228 Mo. 585, 128 S. W. 995; Dorr v. Rohr, 82 Va. 359; Shenandoah Valley R. Co. v. Ashby's Trustees, 86 Va. 232, 9 S. E. 1003; McClure-Mahie Lumber Co. v. Brooks, 46 W. Va. 732, 34 S. E. 921.

As to amendment after judgment, see, par. 10, this article. See Kerr's Pleading and Practice, § 235.

As to jurisdictional defects, see Kerr's Pleading and Practice, § 38.

Deputy's return in own name and not in name of sheriff by him, is a nullity.—Reinhart v. Lugo, 86 Cal. 395, 24 Pac. 1089.

Signature to return without official title or designation, and not sworn to is a nullity, and cannot be validated by proving that the person signing the return was a deputy-sheriff.—Reinhart v. Lugo, 86 Cal. 395, 24 Pac. 1089.

(37) See, in this connection, discussion in Kerr's Pleading and Practice, § 143.

(38) See Id., §§ 39, 118.

(39) There must be something in the record to amend by.—Bernard v. Stevens, 2 Aik. (Vt.) 429.

innocent third parties would be adversely affected.[40] Thus, it is held in California that after the lapse of the period for redemption, the court has no jurisdiction to permit the sheriff to so amend his return to the writ of process as to validate a sale otherwise invalid.[41] On the other hand, there are cases to the effect that the courts have power to amend their process and records, notwithstanding the fact that existing rights may be affected.[42]

6.—*Character and Scope of Amendment.* Amendments may be allowed which are necessary to make the return conform to the true state of facts at the time of the return and necessary to show the acts and things actually done by the officer making the service of the process,[43] where the intervening rights of third persons will not be adversely affected,[44] and manifest injustice will not be done thereby.[45] Such amendment must conform to the true state of facts, and show the whole truth.[46] The amendment must be confined to things within the personal knowledge of the officer,[47] and to acts done by him at the time and in the capacity in which he was acting. Thus, where an officer occupies a dual capacity or position, *e. g.*, special constable, with restricted powers, and town marshal, with general powers, he cannot be permitted to amend a return made in a capacity in which he had no power to make the service of the process, to the capacity in which he had power to make it.[48] Among the particulars in which amendments may be made to show the true state of facts are:

Method of service, where not sufficiently shown by the return, the return may be amended according to the fact, where the process was in fact served;[49] as by showing that a substituted service of a summons was made on the defendant, by leaving a copy thereof at his usual place of residence, with a member of his family.[50]

Date on which service of process made inadvertently omitted,[51] or inaccurately stated, on leave of the trial court first obtained, the return may be amended, or corrected, by showing the date of the service, or the correct date of the service.[52]

Time of return being wrong,—*e. g.,* when made during vacation of the court,—the process being properly and regularly issued and duly and legally served, an amendment may be allowed *nunc pro tunc* at the ensuing session of the court.[53]

Identity of defendant sued with the person served, where defendant sued in a fictitious name, may be shown by an amend-

(40) New hall v. Provost, 6 Cal. 85; Johnson v. Wilmington & N. C. Electric R. Co., I Penn. (Del.) 87, 39 Atl. 777; Tewalt v. Irwin, 164 Ill. 592, 46 N. E. 13; Glidden v. Philbrick, 56 Me. 222; Milliken v. Bailey, 61 Me. 316; Bessey v. Vose, 73 Me. 217; Berry v. Spear, 75 Me. 35; Main v. Lynch, 54 Md. 664; Emerson v. Upton, 26 Mass. (9 Pick.) 157; Howard v. Priestley, 58 Miss. 21; Ohio Life Ins. Co. v. Urbana Ins. Co., 13 Ohio 227; Harry v. Hovey, 30 Ohio St. 344; Hass v. Sedlak, 9 Ore. 462; French v. Edwards, 5 Sawy. 266, 274, Fed. Cas. No. 5098; Rickards v. Ladd, 6 Sawy. 40, 45, Fed. Cas. No. 11804.

(41) McGrath v. Wallace, 116 Cal. 548, 553, 48 Pac. 719.

(42) Tilton v. Cofield, 93 U. S. 163, 23 L. Ed. 858. See Jackson v. Esten, 83 Me. 162, 21 Atl. 830.

(43) See par. 3, this article.

(44) See par. 5, this article.

(45) Clayton v. State, 24 Ark. 16.

(46) Wolcott v. Ely, 84 Mass. (2 Allen) 338.

(47) See par. 15, this article.

(48) See: Anthanissen v. Brunswick & S. A. Steam Towing & Wrecking Co., 92 Ga. 409, 17 S. E. 951; Mitchell v. Shaw, 53 Mo. App. 652.

(48) Allison v. Thomas, 72 Cal. 562, 14 Pac. 309; Golden Paper Co. v. Clark, 3 Colo. 321; Jackson v. Ohio & M. R. Co., 15 Ind. 192; Armond v. Adams, 25 Ind. 455; Wilkins v. Tourtellot, 28 Kan. 825; Howard v. Priestley, 58 Miss. 21; Crocker v. Mann, 3 Mo. 472, Northrup v. Shephard, 23 Wis. 513.

(50) Crocker v. Mann, 3 Mo. 472.

(51) Lee v. State, 47 Okla. 738, 150 Pac. 665.

(52) First Nat. Bank v. Ellis, 27 Okla. 699, 114 Pac. 620; Lee v. State, 47 Okla. 738, 150 Pac. 665. See: Furr v. Bank of Fairmount, 139 Ga. 815, 78 S. E. 181; Linder v. Crawford, 95 Ill. App. 183; Cobb v. Newcomb, 7 Iowa 43; O'Hara v. Independence Lumber & Imp. Co., 42 La. Ann. 226, 7 So. 533; Haven v. Snow, 31 Mass. (14 Pick.) 28; Johnson v. Day, 34 Mass. (17 Pick.) 106; Heymes v. Champlin, 52 Mich. 25, 17 N. W. 226; Snyder v. Schram, 59 How. Pr. (N. Y.) 404; Williams v. Weaver, 101 N. C. 1, 7 S. E. 565; Payne v. Long-Bell Lumber Co., 9 Okla. 683, 60 Pac. 235; Osborne v. Hughey, 14 Okla. 29, 76 Pac. 146; White v. Ladd, 34 Ore. 422, 56 Pac. 515; Foster v. Crawford, 57 S. C. 551, 36 S. E. 5.

(53) Johnson v. Wilmington & N. Electric R. Co., 1 Penn. (Del.) 87, 39 Atl. 777.

ment to the return of service of process, has recently been held in California,[54] but this doctrine is open to serious doubt.

Name of defendant served incorrectly given,[55] or where the return fails properly to show the person upon whom service was made, upon leave of court first duly obtained, the return may be amended to show the true name,[56] in accordance with the actual facts;[57] but the officer making service of process may not be permitted, by amendment of the return, to substitute one person for another person, as the party upon whom the service was made,[58] notwithstanding a holding in California to the contrary, permitting deputy sheriff, by oath, to change the defendant served from individual to representative capacity.[59]

Return made by deputy in his own name instead of in the name of the sheriff, his principal:[60] on leave of the court, the return may be amended by making the return in the name of the sheriff, by such deputy.[61]

(54) See, ante, par. 3, this article, footnote 30, and text going therewith.
The soundness of this doctrine may well be questioned. Where the attorney for the plaintiff does not know the name of the person whom he is suing and has to sue him by a fictitious name, how can a ministerial officer serving the process be presumed to have any more definite knowledge of identity?
(55) Marsh v. Phillips, 77 Ga. 436; Alford v. Hoag, 8 Kan. App. 141, 54 Pac. 1105; Frost v. Paine, 12 Me. 111.
(56) Cleveland v. Pollard, 37 Ala. 556; McKane v. Democratic Committee, 1 N. Y. Supp. 580.
(57) Gaff v. Spellmeyer, 13 Ill. App. 294; affirmed, 112 Ill. 29, 1 N. E. 170; Wilkins v. Tourtellot, 28 Kan. 825; Louisville, H. & St. L. R. Co. v. Com., 104 Ky. 35, 46 S. W. 207; Phillips v. Evans, 64 Mo. 17.
(58) Union Pac., D. & G. R. Co. v. Perkins, 7 Colo. App. 184, 2 Pac. 1047.
(59) Morrissey v. Gray, discussed, post, § 234.
(60) First Nat. Bank v. Ellis, 27 Okla. 699, 114 Pac. 620.
"In the absence of any statute fixing the form of return, or of any showing of prejudice to the defendant or party served, a return made by a deputy-sheriff in his own name on a summons would not be void, so as to require the reversal of a judgment, but that, if it were otherwise, it would be subject to amendment. A number of courts, where the question has been presented, have so held."—Id., citing Bean v. Haffendorfer, 84 Ky. 685, 2 S. W. 556, 3 S. W. 138; Calender v. Olcott, 1 Mich. 344; Wheeler v. Wilkins, 19 Mich. 78; Stole v. Padley, 98 Mich. 13, 56 N. W. 1042; Kelly v. Harrison, 69 Miss. 856, 12 So. 261; Ford v. De Villers, 2 McC. L. (S. C.) 144; Miller v. Alexander, 13 Tex. 497; Eastman v. Curtis, 4 Vt. 616.
See, also, authorities in footnote 52, this article.
Mere irregularity where a deputy-sheriff returns service in his own name (Hill v. Gordon, 45 Fed. 276), not affecting the jurisdiction of the court over the person of the person served. —Kelly v. Harrison, 69 Miss. 856, 12 So. 261.
(61) See authorities in footnote 10, this section.

Return not signed is a mere irregularity[62] which does not render the return *ipso facto* void;[63] and where there are memoranda made on the writ of process at the time of service by means of which it can be perfected, the return may be amended by the officer signing such return,[64] even after a lapse of six years,[65] and when the sheriff, or other officer serving the process, is out of office.[66]

Failure to make any return to the service of a writ of process has been said not to be fatal to the jurisdiction of the court, to be a defect of form merely and not of substance, and that the court, at the trial, should allow the return to be made.[67] This doctrine is based upon the assumption that a due and legal service was in fact made.

7.—*Jurisdiction Cannot be Conferred by Amendment.* The sole object of allowing amendments to returns of service of process is to cure irregularities and omissions in such returns, to record correctly the actual state of facts at the time of the return, not to introduce new conditions or a different state of facts. We have already seen that a prerequisite to an amendment is the existence of a legal and valid service of process.[68] An amendment cannot cure jurisdictional defects[69] and nullities; and where the court acquires no jurisdiction over the person of the defendant by reason of infirmities in the service of process, no amendment to the return can confer jurisdiction upon the court, because no after-proceedings can infuse validity into that which was a mere nullity;[70] that is, the

(62) Dewar v. Spencer, 2 Whart. (Pa.) 211.
(63) See: Com. v. Chauncey, 2 Ashm. (Pa.) 99; Dewar v. Spencer, 2 Whart. (Pa.) 211; Rudy v. Com., 35 Pa. St. 166.
(64) Adams v. Robinson, 18 Mass. (1 Pick.) 461. See, ante, § 231, footnote 5.
(65) Thatcher v. Miller, 11 Mass. 413, 13 Mass. 270.
(66) Adams v. Robinson, 18 Mass. (1 Pick.) 461.
(67) Williamson v. Farrow, 1 Bail. L. (S. C.) 611.
(68) See footnote 4, this article.
(69) As to jurisdictional defects, see Kerr's Pleading and Practice, § 38.
(70) Kendall v. Washburn, 14 How. Pr. (N. Y.) 380. See: Clapp v. Graves, 26 N. Y. 418, 420; Talcott v. Rosenberg, 3 Daly (N. Y.) 203, 8 Abb. Pr. N. S. 287; Hallett v. Righters, 13 How. Pr. (N. Y.) 43; Settlemier v. Sullivan, 97 U. S. 444, 24 L. Ed. 1110.

record, in its existing condition, must show jurisdiction in the court without the amendment, otherwise the amendment cannot confer jurisdiction on the court.[71] There are some cases, however, which do not seem to grasp this fundamental principle,[72] and among them two California cases.

8.—*Morrissey v. Gray*[73] is an instance in which the doctrine announced is peculiarly open to criticism,—in the interest of those jurisdictions which look to California for precedents in matters of practice,—because of the flagrant violation by the trial court of settled legal principles, the prominent earmarks of fraud, manifest perjury for the purpose of conferring jurisdiction, after return of an insufficient service, where no jurisdiction existed,—all standing out so plainly as not only to warrant, but the ends of justice plainly demanding, a reversal. The facts in the case, those sufficient for this discussion, are these: In an action to foreclose a mortgage executed by a decedent, his wife, in her personal capacity, and as administratrix, and the heirs of decedent, were made parties defendant in the complaint. The process was served and the return shows unmistakably the character of the service, the person upon whom, and the capacity in which served, as well as the reasons for its method of service, the return reading: "I hereby certify that I received the within summons on the seventeenth day of April, A. D. 1893, and personally served the same on April nineteenth, A. D. 1893, by delivering to Johanna Morrissey a copy of the said summons attached to a copy of the complaint personally in the county of Butte, and that by order of the plaintiff's attorney none of the other defendants were served. Dated this nineteenth day of April, 1893.' There was no service upon the administratrix, and no service which could confer upon the court jurisdiction to enter default judgment and a decree of foreclosure against the estate of the decedent, and it was not within the judicial discretion of the trial judge, after sale of the property, and after he had taken an assignment of the property, to authorize, procure or allow an amendment by the sheriff which contradicted and gave the lie to his original return.[74] There were no memoranda upon the writ of process from which the amendment could be allowed, and the court in causing or allowing him to impeach his original return by his oath plainly and wilfully violated the law for the advantage of the judge's title to the land. The original return not only recites that the service was made upon Johanna Morrissey, but further recited that "by order of the plaintiff's attorney" service of the process was not made upon any of the other defendants,—and the plain record of the court, before and at the time of the amendment, showed, by the return of the officer serving the process, that Johanna Morrissey, as administratrix, was not served "by order of plaintiff's attorney." The administratrix, as the personal representative of decedent, not having been served, the trial court never acquired jurisdiction in the cause to enter a default against decedent's estate and to decree foreclosure and sale of the property, and no amendment to the return could rightfully be made which could confer that jurisdiction. The service was jurisdictionally defective and could not be amended.[75] And even if the return could have been amended, it could not be amended by the deputy sheriff making the service by substituting Johanna Morrissey in her representative capacity for Johanna Morrissey in her individual capacity—two separate

(71) See, among other cases, McGahen v. Carr, 6 Iowa 331; Hunter v. Eddy, 11 Mont. 264, 28 Pac. 300; Scorpion Silver Min. Co. v. Marsano, 10 Nev. 370; Victor Mill & Min. Co. v. Justice Court 18 Nev. 21, 24, 1 Pac. 831; Hallett v. Righters, 13 How. Pr. (N. Y.) 43; Thatcher v. Powell 19 U. S. (6 Whart.) 119, 127, 5 L. Ed. 221, 223; Galpin v. Page, 85 U. S. (18 Wall.) 350 21 L. Ed. 959; Pennover v. Neff, 95 U. S. 714, 24 L. Ed. 565; Settlemier v. Sullivan, 97 U. S. 444, 24 L. Ed. 1110.

(72) See, among other cases, Mason v. Messenger, 17 Iowa. 261; Foreman v. Carter, 9 Kan. 674; Kirkwood v. Reedy 10 Kan. 453; Rickards v. Ladd, 6 Sawy. 40, Fed. Cas. No. 11804.

(73) Morrissey v. Gray, 160 Cal. 390, 117 Pac. 438; Morrissey v. Gray, 162 Cal. 638, 124 Pac. 246.

(74) See par. 3, this article, footnotes 31-33 and text going therewith.

(75) See footnotes, 35-38, this article.

and distinct individuals, as much as though the personal representative had been another individual than Johanna Morrissey.[76]

This case furnishes a fine illustration of the folly of taking a "drag-net appeal," in the hope that the court may find something warranting a reversal. The court manifestly became so entangled in the meshes of platitudes and non-essentials, presented and pressed as though they were matters of real importance, that the outlaying fundamental principle controlling—or which should control—the case, was overlooked.

9.—*Time Within Which Amendment May be Made.* There is no specific time within which the return to the service of process must be amended,[77] and for that reason the amendment may be made at any time, the rights of third persons not being adversely affected thereby;[78] but the lapse of time should be taken into consideration by the court in determining upon the propriety of allowing or disallowing the proposed amendment.[79] Such an amendment is generally allowed in those cases in which the purpose of the amendment is not to confer jurisdiction on the court, but merely to perfect the proof of the jurisdiction which the court had previously acquired.[80] Thus, in a case of service of the summons without making a return thereof, an amendment by making the proper return, it has been said, should be allowed on the trial;[81] and where memoranda were made on the writ of process at the time of service thereof, an amendment in accordance with such memoranda was allowed after six years.[82]

(76) See footnote 58, this article, and text going therewith.

(77) Kahn v. Mercantile Town Mut. Ins. Co., 228 Mo. 585, 128 S. W. 995.

(78) Barnard v. Stevens, 2 Ark. (Vt.) 429.

(79) See: Woodward v. Harbin, 4 Ala. 534, Gaff v. Spellmeyer, 13 Ill. App. 294; affirmed, 112 Ill. 29, 1 N. E. 170; Jeffries v. Rudloff, 73 Iowa 60; 34 N. W. 756; Kirkwood v. Reedy, 10 Kan. 453; Wilton Mfg. Co. v. Butler, 34 Me. 432; Scruggs v. Scruggs, 46 Mo. 271; O'Brien v. Gaslin, 20 Neb. 347, 30 N. W. 274; Northwood v. Barrington, 9 N. H. 369; Avery v. Bowman, 39 N. H. 393; Shenandoah Valley R. Co. v. Ashby's Trustees, 86 Va. 232, 9 S. E. 1003.

(80) Shenandoah Valley R. Co. v. Ashby's Trustees, 86 Va. 232, 9 S. E. 1003.

(81) Williamson v. Farrow, 1 Bail. L. (S. C.) 611.

(82) Thatcher v. Miller, 11 Mass. 413, 13 Mass. 270.

It is not practical, even if desirable, to give here all the instances as to the time when amendments to return of process were allowed; it is sufficient to designate the following:

10.—*After judgment by default,* where the cause of justice is subserved by making the return conform to the true state of facts by showing that the process was properly and legally served upon the defendant before the judgment was directed to be or was entered,[83] where no intervening rights are injuriously affected;[84] but such amendment must be in affirmance of the judgment.[85]

11.—*After appeal,*[86] or pending writ of error,[87] the return to the service of the process has been allowed to be amended, such amendment in the trial court being shown

(83) See Hefflin v. McMinn, 2 Stew. (Ala.) 492; Newman, In re, 75 Cal. 213, 16 Pac. 887; Allison v. Thomas, 72 Cal. 562, 14 Pac. 309; Herman v. Santee, 103 Cal. 519, 37 Pac. 509; McGinn v. Rees, 33 Cal. App. 291, 165 Pac. 52; Freeman v. Cahart, 17 Ga. 349; Johnson v. Donnell, 15 Ill. 97; Durham v. Heaton, 28 Ill. 264; Toledo, P. & W. R. Co. v. Butler, 53 Ill. 323; Chicago Planing Mill Co. v. Merchants' Nat. Bank, 86 Ill. 587; La Salle County v. Milligan, 143 Ill. 321, 32 N. E. 196; Kirkwood v. Reedy, 10 Kan. 453. Mason v. Anderson, 19 Ky. (3 T. B. Mon.) 294; Thompson v. Moore, 91 Ky. 80, 15 S. W. 6; Burr v. Seymour, 43 Minn. 401, 45 N. W. 715; Kitchen v. Reinsky, 42 Mo. 427; McClure v. Wells, 46 Mo. 311; Snyder v. Schram, 59 How. Pr. 404; Dewar v. Spencer, 2 Whart. (Pa.) 211; Stotz v. Collins, 83 Va. 423, 2 S. E. 737; Shenandoah Valley R. Co. v. Ashby's Trustees, 86 Va. 232, 9 S. E. 1003; Commercial Union Assur. Co. v. Everhart's Admr., 88 Va. 952, 14 S. E. 836; Cunningham v. Spokane Hydraulic Min. Co., 20 Wash. 450, 72 Am. St. Rep. 113, 55 Pac. 756; Capehart v. Cunningham, 12 W. Va. 750; Bacon v. Bassett, 19 Wis. 45; Fisk v. Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766.

See, also, footnotes 31-35, this article.

(84) Allison v. Thomas, 72 Cal. 562, 564, 14 Pac. 318.

(85) Chicago Planing Mill Co. v. Merchants' Nat. Bank, 97 Ill. 294, 300; Wilcox v. Sweet, 24 Mich. 355; Montgomery v. Merrill, 36 Mich. 97; Stewart v. Stringer, 45 Mo. 116; Magrew v. Foster, 54 Mo. 258; Dunham v. Wilfong, 69 Mo. 355; Gasper v. Adams, 24 Barb. (N. Y.) 287; Mills v. Howland, 2 N. D. 30, 49 N. W. 413; Moyer v. Cook, 12 Wis. 335.

Doctrine carried to unwarranted length in a case where the service of process was not sufficient to give the court jurisdiction, and after judgment the trial court permitted sheriff to amend return to service of process by substituting an entirely different party as the person on whom the process was served.—Morrissey v. Gray, 160 Cal. 390, 117 Pac. 438; Morrissey v. Gray, 162 Cal. 638, 124 Pac. 246.

See criticism of these cases, pars. 7 and 8, this article.

(86) See Loveland v. Sears, 1 Colo. 433; Jenkins v. Crofton's Adm'r, 10 Ky. L. Rep. 456, 9 S. W. 406; Snyder v. Schram, 59 How. Pr. (N. Y.) 404; Thomas v. Goodman, 25 Tex. Supp. 446; Hopkins v. Baltimore & O. R. Co., 42 W. Va. 535, 26 S. E. 187; Gauley Coal Land Assoc. v. Spies, 61 W. Va. 19, 55 S. E. 903.

(87) Hefflin v. McMinn, 2 Stew. (Ala.) 492.

in the appellate court by a supplemental record.[88]

12.—*After suit brought against sheriff* for a false return,[89] to enforce his liability therefor, the trial court may permit the officer to amend the return in those cases where justice requires that this should be done,[90] but such amendment rests purely in the sound judicial discretion[91] of the court;[92] and it has been said that an amendment cannot be allowed where the liability is fixed on the sheriff by the original return,[93] or after judgment against the officer for a false return.[94]

13.—*After expiration of term of office* of the sheriff or other officer serving the process, the trial court, in its sound judicial discretion, may allow an amendment to be made to the return by the officer serving the process, in those cases in which the ends of justice require such an amendment, and there is matter in the record from which such amendment can be made,[95] because the making of such an amendment is not the doing of an official act, but merely perfecting the evidence relative to an act already regularly and legally done.[96] Thus, where memoranda were made upon the writ of process at the time of service, but the return was unsigned, the sheriff was permitted to complete the return by signing, although his term of office had expired.[97]

14.—*After removal of cause* from a state court to a federal court, the sheriff cannot be permitted to amend, in the state court, the return on the service of process, for the reason that the removal of the cause divests the state court of all jurisdiction in the cause,[98] but there may be an amendment to the return in the federal court to which the cause is removed.[99]

15.—*Who May Amend Return.* An amendment to the return on service of a writ of process can properly be made only by the officer who made the service of the process, or in accordance with memoranda made by such serving officer, which memoranda state the facts omitted from, or incorrectly stated in, the return made to the writ.[100] A sheriff cannot amend a return made by his deputy[101] for the reason that a sheriff cannot be presumed to have personal knowledge as to what was done by his deputy in making a service of process; and if the facts can be established from memoranda made upon the original writ at the time by such deputy, it must be on proof

(88) See Brown v. Hill, 5 Ark. 78; Bizzell v. Stone, 8 Ark. 478; Loveland v. Sears, 1 Colo. 433; Hawes v. Hawes, 33 Ill. 286; Toledo, P. & W. Co. v. Butler, 53 Ill. 323; Terry v. Eureka College, 70 Ill. 236; Tennent-Stribbling Shoe Co. v. Hargardine-McKittrick Dry Goods Co., 58 Ill. App. 368; Irving v. Scobee, 15 Ky. (5 Lit.) 70; Shamburg v. Noble, 80 Pa. St. 160; Gauley Coal Land Assoc. v. Spies, 61 W. Va. 19, 55 S. E. 903.

(89) In Arkansas at any time before action against officer for false return has been sustained.—Brinkley v. Mooney, 9 Ark. 445; Claytou v. State, 24 Ark. 16.

(90) Hodges v. Laird, 10 Ala. 678; Governor v. Bancroft, 16 Ala. 614; Niolin v. Hamner, 22 Ala. 578; Jeffries v. Rudloff, 73 Iowa 60, 5 Am. St. Rep. 654, 34 N. W. 756; Wilton Mfg. Co. v. Butler, 34 Me. 432; Trotter v. Parker, 38 Miss. 473; Corby v. Burnes, 36 Mo. 194; Northwood v. Barrington, 9 N. H. 369; People v. Ames, 35 N. Y. 482; Stealman v. Greenwood, 113 N. C. 355, 18 S. E. 503; Swain v. Burden, 124 N. C. 16, 32 S. E. 419; Whitman v. Higby, 24 Pa. Co. Ct. Rep. 236, 10 Pa. Dist. Rep. 39; Hill v. Hinton, 39 Tenn. (2 Head.) 124; Thomas v. Browder, 33 Tex. 783; Barnard v. Stevens, 2 Aik. (Vt.) 429.

(91) As to discretion of court, see footnote 28, this article.

(92) Campbell v. Smith, 115 N. C. 498, 20 S. E. 723.

(93) Governor v. Bancroft, 16 Ala. 605.

(94) Mullins v. Johnson, 22 Tenn. (3 Humph.) 396; Carr v. Meade, 77 Va. 142.

(95) Wilson v. Ray, T. U. P. Charlt. 109; Beutell v. Oliver, 89 Ga. 246, 15 S. E. 307; Johnson v. Donnell, 15 Ill. 97; La Salle County v. Milligan, 143 Ill. 321, 32 N. E. 196; Dwiggins v. Cook, 71 Ind. 579; Jeffries v. Rudloff, 73 Iowa 60, 5 Am. St. Rep. 654, 34 N. W. 756; Alford v. Hoag, 8 Kan. App. 141, 54 Pac. 1105; Gay v. Caldwell, 3 Ky. (1 Hard.) 68; Burnie v. Overstreet, 47 Ky. (8 B. Mon.) 302; Newton v. Prather, 62 Ky. (1 Duv.) 100; Louisville, H. & St. L. R. Co. v. Com., 20 Ky. L. Rep 371, 46 S. W. 207; Keen v. Briggs, 46 Me. 467; Adams v. Robinson, 18 Mass. (1 Pick.) 461; Miles v. Davis, 19 Mo. 408; Avery v. Bowman, 39 N. H. 393; Shenandoah Valley R. Co. v. Ashby's Trustees, 86 Va. 232, 9 S. E. 1003.

(96) Morris v. Schools, 15 Ill. 266; Armstrong v. Easton, 40 Ky. (1. B. Mon.) 68.

(97) Adams v. Robinson, 18 Mass. (1 Pick.) 461.

(98) Hall v. Stevenson, 19 Ore. 153, 23 Pac. 887. See State v. Rayburn, 31 Mo. App. 385; Tallman v. Baltimore & O. R. Co., 45 Fed. 156; Hawkins v. Price, 79 Fed. 452.

(99) See, among other cases, Richmond v. Brookings, 48 Fed. 241, 242; Stalker v. Pullman's Palace-Car Co., 81 Fed. 989, 990.

(100) Knapp v. Wallace, 50 Ore. 348, 92 Pac. 1054. See O'Conner v. Wilson, 57 Ill. 226; La Salle County v. Milligan, 143 Ill. 321, 32 N. E. 196; Gaff v. Spellmeyer, 13 Ill. App. 294; affirmed, 112 Ill. 29, 1 N. E. 170; Carroll County Bank v. Goodall, 41 N. H. 81.

Officer must have interest in the amendment before it can be made, under some statutes.—See Lowenstein v. Krell, 162 Pa. St. 267, 29 Atl. 878.

(101) O'Conner v. Wilson, 57 Ill. 226, 234.

to the court.[102] Thus, it has been held that a sheriff, after expiration of his office, cannot amend a return to a service of process by his deputy, not as to matters of form, but as to matters of fact relating to the service;[103] and where the sheriff was incompetent to serve the process, service by his deputy, being service by him, will be invalid, and the sheriff will not be permitted to amend a return on such process by his deputy;[104] but where the sheriff was competent to serve the process he may amend the return of his deputy, even after the expiration of his term of office,[105] and the decease of the deputy, where such deputy made memoranda on the original process at the time of service from which such amendment can be made;[106] in the absence of such memoranda the sheriff cannot be permitted to amend the return.[107]

16.—*Deputy sheriff may amend,* in the name of the sheriff by him, where the sheriff was competent to make service of the process, a return to a service of process made by him,[108] although the right to so amend is limited to his term of office as deputy in some jurisdictions,[109] and if he is deceased, amendment must be by the sheriff, where the deputy made memoranda on the process at the time from which such amendment can be made.[110] But after the sheriff has become guarantor of the title of property sold by him under an execution on a judgment obtained in the proceeding, the deputy sheriff serving the process has been held to be incompetent to amend an erroneous return.[111]

17.—*Method of Amendment to Return.* The usual manner in which an amendment to a return of service of process is made, after the return has been filed, is by application made by the officer serving the process to the court for permission to make the proposed amendment;[112] and while the allowing or disallowing of the proposed amendment is a matter of sound judicial discretion,[113] we have already seen that such applications are treated with liberality, and are allowed whenever the interests of justice demand that the amendment shall be made in order to make the record conform to the facts in the case.[114] But an amendment to a return of service of process may be allowed, or directed and compelled upon the application of a party to the suit, or by a purchaser under an execution on a judgment obtained in the proceedings under the service of the process, as well as upon application of the officer serving the process for leave to amend.[115] On such an application, however, the court can compel an amendment of the return in such a manner as to complete an imperfect or insufficient return, only,—*i. e.,* require a return that is appropriate to the writ as a matter of law,[116]—not as to facts not shown by memoranda made by the officer upon the original writ at the time.[117] While the court can direct and compel the officer to

(102) Knapp v. Wallace, 50 Ore. 348, 92 Pac. 1054. See Smith v. Martin, 20 Kan. 572; Bayley, In re, 132 Mass. 457; Fisk v. Hunt, 33 Ore. 424, 54 Pac. 660; White v. Ladd, 34 Ore. 422, 56 Pac. 515.

By sheriff in some jurisdictions.—See footnotes 106 and 107, this article.

(103) Knapp v. Wallace, 50 Ore. 348, 92 Pac. 1054.

(104) O'Conner v. Wilson, 57 Ill. 234.

(105) As to amendment after expiration of term of office, see, ante, § 235, footnotes 18-21, and text going therewith.

(106) See Ingersoll v. Sawyer, 19 Mass. (2 Pick.) 276; Avery v. Bowman, 39 N. H. 393.

In Washington return must be amended on proof to the court.—See footnote 102, this article.

(107) See OConner v. Wilson, 57 Ill. 226.

(108) Stone v. Wilson, 10 Gratt. (Va.) 533.

(109) See Shores v. Witworth, 76 Tenn. (8 Lea.) 662.

(110) See footnotes 106 and 107, this article.

(111) O'Connor v. Wilson, 57 Ill. 226.

(112) See par. 17, footnote 6, this article.

Actual amendment necessary, mere permission of the court that a specified amendment to the return of service of process may be made, is not equivalent to amendment; until the amendment granted is made, the record is in the same condition it was before application for leave to amend was made.—See Wittstruck v. Temple, 58 Neb. 16, 78 N. W. 456.

(113) See footnotes 27 et seq., this article.

(114) Id.

(115) Johnson v. Wilmington & N. C. Electric R. Co., 1 Penn. (Del.) 87, 39 Atl. 777; Beutell v. Oliver, 89 Ga. 246, 15 S. E. 307; Stetson v. Freeman, 35 Kan. 523, 531, 11 Pac. 431; Youngstown Bridge Co. v. White's Adm'r, 105 Ky. 273, 49 S. W. 36.

(116) Dixon v. White Sewing Machine Co., 128 Pa. St. 397, 407, 18 Atl. 502; Washington Mill Co. v. Kinnear, 1 Wash. Tr. 99.

(117) Hewell v. Lane, 53 Cal. 213, 217; People v. Goldenson, 76 Cal. 328, 345, 19 Pac. 161. See Humphries v. Lawson, 7 Ark. 341; Wilcox v. Moudy, 89 Ind. 232; Sawyer v. Curtis, 2 Ashm. (Pa.) 127.

make the appropriate formal return the writ requires in law, conformable to the facts in the case,[118] the court cannot direct the officer serving the process as to what the return shall be,[119] or compel the amendment of a return, regular and sufficient at law, as to matters of fact.[120]

18.—*On Notice.* In one line of cases it is held that the return of the officer serving a process may be amended as a matter of course, and that notice of the application to the parties interested is not necessary, in the absence of a statute requiring it;[121] that, strictly speaking, the proceeding is one between the officer and the court, is *ex parte* in its nature, and that, in contemplation of the law, the amended return is made under the same sanction and responsibility as to the erroneous or mistaken one.[122] But the better doctrine, supported by the better reason if not also by the weight of the adjudicated cases, is to the effect that such an amendment should not be allowed except upon due notice to the parties interested, and whose rights may be adversely affected by the proposed amendment;[123] and particularly is this true in those cases in which the proposed amendment is not based upon data in the record, —*e. g.*, memoranda made upon the writ at the time of serving by the officer,—but depends upon extraneous matters,[124] or where a long time has elapsed after the original return was made, and new interest may have supervened, or a defendant's interests may be adversely affected.[125] Where a proposed amendment is as to matters touching the jurisdiction of the court over the person of the defendant, an amendment can never be properly allowed without due notice to the defendant affected.[126]

Waiver of objection for want of notice results by reason of neglecting to ask to have the order allowing the amendment set aside and vacated, or by controverting the facts in such amended return, where subsequent notice comes to the party claiming to have been injured by such amendment, and who could have so moved or controverted the amendment, but failed to do so.[127]

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(118) See Gavitt v. Doub, 23 Cal. 81; Hewell v. Lane, 53 Cal. 213, 217; Rousset v. Boyle, 45 Cal. 64; People v. Murback, 64 Cal. 369, 30 Pac. 618; People v. Goldenson, 76 Cal. 328, 345, 19 Pac. 161.

(119) Vastine v. Fury, 2 Serg. & R. (Pa.) 426; Maris v. Schermerhorn, 3 Whart. (Pa.) 13; Dixon v. White Sewing-Machine Co., 128 Pa. St. 397, 407.

(120) Flynn v. Kalamazoo District Court, 138 Mich. 127, 101 N. W. 222; Washington Mill Co. v. Kinnear, 1 Wash. Tr. 99; Smith v. Gaines, 93 U. S. 341, 343, 23 L. Ed. 901.

(121) Herman v. Santee, 103 Cal. 519, 37 Pac. 509; Woodward v. Brown, 119 Cal. 283, 299, 51 Pac. 542; Morrissey v. Gray, 160 Cal. 390, 117 Pac. 438; Morrissey v. Gray, 162 Cal. 638, 124 Pac. 246; McGinn v. Rees, 33 Cal. App. 291, 165 Pac. 52; Rickards v. Ladd, 6 Sawy. 40, Fed. Cas. No. 11804. See: Brown v. Hill, 5 Ark. 78; Lungren v. Harris, 6 Ark. 474; Bizzell v. Stone, 8 Ark. 478; Moore v. Purple, 8 Ill. (3 Gilm.) 149; Morris v. Schools, 15 Ill. 266, 269; Kitchen v. Reinsky, 42 Mo. 427.

Notice to defendant is not a prerequisite to permitting sheriff to amend his return.—Kahn v. Mercantile Town Mut. Ins. Co., 228 Mo. 585, 128 S. W. 995.

(122) Rickards v. Ladd, 6 Sawy. 40, Fed. Cas. No. 11804. See: Morris v. Schools, 15 Ill. 266, 269; Dunn v. Rogers, 43 Ill. 260; Jeffries v. Rudloff, 73 Iowa 60, 34 N. W. 756; Stetson v. Freeman, 35 Kan. 523, 11 Pac. 431; Green v. Kindy, 43 Mich. 280, 5 N. W. 297; Kitchens v. Reinsky, 42 Mo. 427; Shufeldt v. Barlass, 33 Neb. 785, 51 N. W. 134; Phoenix Ins. Co. v. King, 52 Neb. 562, 72 N. W. 855; White's Appeal, 25 Pa. St. 373.

(123) Green v. Kindy, 43 Mich. 278, 5 N. W. 297; Shufeldt v. Barlass, 33 Neb 785, 5 N. W. 134; Phoenix Ins. Co. v. King, 52 Neb. 562, 72 N. W. 855; Wittstruck v. Temple, 58 Neb. 16, 78 N. W. 456; Mills v. Howland, 2 N. D. 30, 49 N. W. 413; Stalker v. Pullman's Palace-Car Co., 81 Fed. 989.

(124) Hovey v. Waite, 34 Mass. (17 Pick.) 197; Merrill v. Montgomery, 25 Mich. 72; Montgomery v. Merrill, 36 Mich. 97; Green v. Kindy, 43 Mich. 279, 5 N. W. 297; Cochrane v. Johnson, 95 Mich. 67, 54 N. W. 707; Dobvnes v. United States, 7 U. S. (3 Cr.) 241, 2 L. Ed. 427.

(125) O'Conner v. Wilson, 57 Ill. 226; Thatcher v. Miller, 13 Mass. 271; Hovey v. Waite, 34 Mass. (17 Pick.) 197; Williams v. Doe ex dem. Oppelt, 9 Miss. (1 Smed. & M.) 559; Coopwood v. Morgan, 34 Miss. 368.

"If much time has elapsed since the first return, or if new rights have likely intervened, it is necessary and proper that notice to those interests should be given."—Stetson v. Freeman, 35 Kan. 523, 11 Pac. 431.

(126) Denison v. Smith, 33 Mich. 155; Haynes v. Knowles, 39 Mich. 407; Green v. Kindy, 43 Mich. 279, 5 N. W. 297; Clark v. McGregor, 55 Mich. 412, 21 N. W. 866; King v. Bates, 80 Mich. 367, 45 N. W. 147.

"Amendments without which the court acquires no jurisdiction to try the case can only be made by the court which tried the cause, and upon notice to the opposite party."—King v. Bates, 80 Mich. 367, 45 N. W. 147.

(127) Woodward v. Brown, 119 Cal. 283, 300, 51 Pac. 542.

PRINCIPAL AND SURETY—GUARANTY.

HOMEWOOD PEOPLE'S BANK v. HASTINGS.

Supreme Court of Pennsylvania. Jan. 4, 1919.

106 Atl. 308.

An agreement to guarantee payment of a note, payable on demand, creates the liability of a suretyship as distinguished from technical "guaranty."

FRAZER, J. On September 30, 1908, F. L. Phillips signed a promissory note for $5,250, payable to his order on demand, on which was indorsed the following memorandum signed by defendant:

"For value received I hereby guarantee payment of within note and waive demand, protest and notice of protest on the same."

The note was accompanied by shares of stock deposited with the bank as collateral and discounted by plaintiff bank on the day indorsement was made. Payments on account were made from time to time, the last under date of February 6, 1912. On September 19, 1913, Phillips was declared a bankrupt and in due course received his discharge without dividends having been paid on account of the obligation. Plaintiff then sold at public auction the collateral accompanying the note and applied the net proceeds on account of the indebtedness it represented, and on January 8, 1917, began his action of assumpsit against defendant on the agreement to guarantee payment. The affidavit of defense pleaded the statute of limitations, and, at the argument on the question of law involved, counsel for the parties stipulated in writing that, if the court should be of opinion the question of law raised was sufficient to dispose of plaintiff's claim and bar recovery, judgment should be entered in favor of defendant. The court concluded defendant was liable as surety, and, as the note was payable on demand, the statute of limitations began to run from its date, and entered judgment for defendant, from which plaintiff appealed.

(1, 2) A guarantor undertakes that another person will pay a debt or perform a duty and such other person remains primarily liable. On the other hand, a surety undertakes to pay the debt or perform the obligation if the debtor fails to do so. In case of default the guarantor is secondarily liable while the surety is equally liable with the principal. Reigart v. White, 52 Pa. 438. The precise character of the obligation in a given instance is often difficult to determine, and the numerous decisions in which the technical distinction between guaranty and suretyship is discussed establish the general principle that, where the contract defines the time when the promissor is to assume liability for the debt, his obligation is that of suretyship; but where there is no time fixed the obligation is general and merely that of guaranty. McBeth v. Newlin, 15 Wkly. Notes Cas. 129; Westinghouse Electric & Mfg. Co. v. Wilson, 63 Pa. Super. Ct. 294. In McBeth v. Newlin, it was said:

"An undertaking that payment of another's debt shall be made when due is a contract of suretyship. Campbell v. Baker, 46 Pa. 243; Roberts v. Riddle, 79 Pa. 468. Where the contract does not fix the time of default on the part of the principal debtor, it is one of guaranty."

In that case the obligation was to pay the principal of a mortgage if the mortgagor did not "when and as soon as the same shall become due and payable." This was clearly a contract of suretyship under the principle just stated. To the same effect are Roberts v. Riddle, supra, and Westinghouse Electric Co. v. Wilson, supra, where an agreement to pay an obligation "according to its terms" was held to be a contract of suretyship and that the agreement was broken by non-payment at the date of maturity. In Campbell v. Baker, supra, and Hartley Silk Mfg. Co. v. Berg, 48 Pa. Super. Ct. 419, an agreement to guarantee payment "when due" was construed to be a contract of suretyship. It will be noted that in the above cases there is a distinct reference to the time at which the obligation was to become effective. A case close to the border line between the two kinds of contracts is Iron City National Bank v. Rafferty, 207 Pa. 238, 56 Atl. 445, where an agreement to guarantee "the prompt payment of the within note" was held to constitute a contract of suretyship notwithstanding the only indication of the time of payment was the word "prompt."

On the other hand, in Isett v. Hoge, 2 Watts, 128, and Mizner v. Spier, 96 Pa. 533, an agreement to "guarantee the payment" of a note was construed to be a guaranty only, and in Zahm v. First National Bank of Lancaster, 103 Pa. 576, a guaranty of "the payment of the within note without protest" was construed to be a mere technical guaranty, and it was held the words "without protest" had no effect other than to prevent the release of indorsers by reason of failure to protest.

(3, 4) The note in controversy here, being payable on demand, became due immediately

(Boustead v. Cuyler, 116 Pa. 551, 8 Atl. 848), thus fixing the liability of the person guaranteeing payment of the obligation as of the day on which it was executed and also creating the liability of suretyship as distinguished from technical guaranty. The debt would therefore be outlawed in six years from the date of the note. The fact that the principal debtor made payment of interest on the note up to February 6, 1912, which was within six years previous to the beginning of the action, and thus tolled the statute of limitations as to him, could not prevent the surety from setting up the statute in bar of an action against the latter on his contract. Meade v. McDowell, 5 Bin. 195; Newell v. Clark, 73 N. H. 289, 61 Atl. 555. His obligation arose at the time the contract was entered into, and his rights cannot be affected by subsequent acts of the principal debtor which would prevent the running of the statute. Clark v. Burn, 86 Pa. 502; McMullen v. Rafferty, 89 N. Y. 456; Carpenter v. Thompson, 66 Conn. 457, 34 Atl. 105; Gardiner v. Nutting, 5 Me. 140, 17 Am. Dec. 211.

The judgment is affirmed.

NOTE—*Distinction Between Surety and Guarantor.*—It has been said that the distinction between "guaranty" and "suretyship" often is more shadowy than substantial. Often the terms are used synonymously. Strictly, however, there is a substantial distinction. It has been said a surety is an insurer against all events; a guarantor merely insures solvency of a debtor. The circumstances are controlling often in the construction of contracts. Thus it has been ruled that joint execution of a contract by one as a debtor and another to insure its performance points to suretyship by the latter. Saint v. Wheeler & Wilson Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. St. Rep. 210.

In this case action was on a sealed contract of employment of one as a collector. Others signing guaranteed faithful performance in the sum of $1,000. Speaking of its execution by the parties, the court said as to the guarantors: "It is not their separate undertaking, but the principal also executes it. While they employ the word 'guarantee,' they directly obligate themselves along with Saint to pay, absolutely and wholly irrespective of Saint's solvency or insolvency, all damages which may result to the obligee from his default. * * * It is, in other words, and in short, a primary undertaking on their part, not secondary and collateral, to pay to the company in the event of Saint's failure, and not an undertaking to pay only in the event of Saint's default and inability to pay. They are sureties of Saint, and not his guarantors, and their rights depend upon the law applicable to the former relation, and not upon the law controlling the latter."

And where an instrument shows an undertaking, as say for an undisclosed principal to do a certain thing or pay a certain sum, it is an original undertaking. There is no promise to which it may be deemed collateral and no notice to the signers of the undertaking need be given. Kemochau v. Murray, 111 N. Y. 306, 7 Am. St. Rep. 744.

And so where signers execute a bond whereby obligee is induced to sell goods to another that they will make good any loss, even if colloquially they may be termed guarantors, they really enter into an original obligation. The promise by them is absolute and requires no notice of acceptance. Wheeler v. Rohrer, 21 Ind. App. 477, 52, N. E. 780.

If signatures are given as necessary to complete a contract, then all are original parties and notice of acceptance is not necessary. Klosterman v. Olcott, 25 Neb. 382, 41 N. W. 250; White Sewing Mach. Co. v. Powell, 25 Ky. L. Rep. 94, 74 S. W. 746.

In Ricketson v. Lizotte, 98 Atl. 801, it is said that: "The authorities on suretyship and guaranty contain some apparently inconsistent statements regarding the right of revocation, most of which can probably be reconciled by some classification of the cases. * * * But where the consideration is not to arise from future successive acts of the guarantee, but is entire and fully executed there can be no revocation, for in such case the guarantor is under a subsisting contract obligation from which he cannot relieve himself by his own act." And discussing the facts of the case before the court, it was said that: "The comment, sometimes made, that the distinction between suretyship and guaranty is shadowy and technical is certainly applicable here."

In McCannon & Co. v. Richardson, 117 Miss. 345, 78 So. 292, it was said in a case where there was a written agreement by one to sell certain goods to others and following after their signatures there was an agreement to "guarantee" full and complete payment." There was suit against all and demurrer for misjoinder of causes and parties defendant which was sustained, this ruling being reversed in Supreme Court. The court said: "While the agreement terms the two demurrants as guarantors, at the same time there is but one written agreement or contract, and that is signed by the principal debtor and the guarantors or sureties. There was no separate guaranty as to the payment of the principal debt, but the entire contract is covered by the one agreement. This agreement is an original promise on the part of the guarantors or sureties to answer for the debt or default of the principal obligee. * * * In reality their contract is one of suretyship."

In Watkins Medical Co. v. Marbach, 20 Ga. App. 691, 93 S. E. 270, there was cited approvingly from former decision that: "We have little sympathy with artificial distinctions between principles of law, which present no substantial difference as to matters of right and justice, which tend to confuse rather than enlighten and to furnish loopholes for technical escapes from contract obligations," and, therefore, the court leaned to the view and so held, that the fundamental distinction between a contract of guaranty and one of suretyship is whether the parties are primarily liable for the promise of their debtor or only secondarily liable therefor.

If the former they are sureties, and not guarantors, however they are designated in the contract itself.

So it all comes down to the test just stated, and this may be determined from the face of the contract, or if it was entered into as an offer to obligee so as to complete the making of a contract. C.

ITEMS OF PROFESSIONAL INTEREST.

SPECIAL NOTICE TO MEMBERS OF THE AMERICAN BAR ASSOCIATION.

A letter from the Secretary of the American Bar Association carries the important information that it will be impossible for the Association to hold its meeting at Eastern Point, New London, Conn., owing to the lack of hotel accommodations. There is only one large hotel at Eastern Point and the demand for accommodations became so great that the hotel company notified the Association that it could not take care of the great number of lawyers who desired to attend the meeting of the Association this year.

The executive committee has voted to send the convention to Boston and a list of the hotels and meeting places of the Association and allied conferences will be mailed to members in a few days and will be published in these columns as soon as we receive it.

PROGRAM OF THE MEETING OF THE ALABAMA BAR ASSOCIATION.

The Forty-second Annual Meeting of the Alabama Bar Association will be held in the city of Selma, Ala., July 4th and 5th, 1919.

The meeting will be opened Friday by the President, Hon J. Manley Foster, of Tuscaloosa.

The following papers will be read: by Mr. John W. Lapsley of Selma, on "Some Needed Judicial and Legislative Reforms as Seen by a Young Lawyer"; by Mr. Sam C. Jenkins of Bay Minette, on "Liberty vs. The Heresy of Propaganda"; by Hon. H. C. Wilkinson of Birmingham, on "Where the State Has Erred"; by Mr. A. C. Lee of Monroeville, on "Some Observations on Modern Tendencies". The annual address will be delivered by Hon. Emmet O'Neal of Birmingham, on "The Susan B. Anthony Amendment—Effect of Its Ratification on the Rights of the States to Regulate and Control Suffrage and Elections."

PROGRAM OF THE MEETING OF THE COLORADO BAR ASSOCIATION.

The twenty-second annual meeting of the Colorado Bar Association will be held at the New Broadmoor Hotel, Colorado Springs, July 11 and 12, 1919. At the same time the State Judges' Association will hold its annual meeting.

The President's address will be delivered by Mr. Clyde C. Dawson, of Denver; the annual address by Judge Wendell Phillip Stafford, of the Supreme Court of the District of Columbia.

Other addresses will be given, as follows: "Military Justice," by Mr. Alva B. Adams, of Pueblo; "Probate and the Alien Property Custodian," by Mr. Lawrence Lewis, of Denver; "Food Control Under the Common Law," by Mr. Archibald A. Lee, of Denver.

HUMOR OF THE LAW.

"Astronomers tell us," said the man of statistics, "that an express train moving a hundred miles a second would consume several million years in reaching a certain star."

The other man sat silent, wrapped in thought.

"Did you hear me?" asked the man of statistics.

"Oh, yes, I heard you," responded the other quietly. "I was just thinking what a predicament a chap would be in if he should miss the last train and have to walk."—Boston Evening Transcript.

The cabby was brought before the magistrate for using violent language to a lady.

"But she ain't no lidy," he protested fiercely.

"Indeed!" said his worship, "and do you know a lady when you see one?"

"Of course I do," indignantly answered the man. "Why, only the other day I saw one; she give me a pound note for a shilling fare and walked away. 'I, mum,' I called, 'what abart yer change?' 'Don't be a blinkin' old fool,' says she, 'keep it, and git drunk enough to kiss yer mother-in-law.' Now, yer worship," he ended triumphantly, "that's what I calls a real lidy."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adverse Possession**—Notorious and Exclusive.—A person who has been in the open, notorious, exclusive, continuous, adverse possession of realty under a claim of right for 10 years, is vested with a valid title.—Petersen v. Kouty, Neb., 171 N. W. 905.

2.——Prescription.—Where a landowner for more than a quarter of a century had been in the actual possession of a strip of land, claiming possession up to such line, regardless of where the true line might be located, he gained title to such strip by adverse possession.—Bingham v. Edmonds, Mo., 210 S. W. 885.

3. **Attachment**—Alias Execution.—A warrant of attachment is not rendered functus officio because a levy has been made thereunder, but under Comp. Laws 1913, § 7545, the sheriff to whom the warrant is delivered may levy from time to time and as often as necessary until the amount for which it was issued has been secured or final judgment has been rendered.—MacDonald v. Fitzgerald, N. D., 171 N. W. 879.

4. **Bailment**—Foreclosure.—Where a garage man at instance of another than original purchaser repaired an automobile subject to foreign lien of a chattel mortgage, his failure to record his claim for lien did not impair his right to retain possession, but only precluded him from foreclosing his lien as a chattel mortgage.—Willys Overland Co. v. Evans, Kan., 180 Pac. 235.

5. **Bankruptcy** — Assignment. — Trustee in bankruptcy of contractor took assets of estate subject to contractor's assignment to sub-contractor of part of the amount due on the contract, which assignment was valid in equity, and not void as in fraud of creditors, or as contravening the Bankruptcy Act.—Andrews Electric Co. v. St. Alphonse Catholic Total Abstinence Soc., Mass., 123 N. E. 103.

6.—Discharge.——Where a bankrupt failed to obtain a discharge, creditors whose claims were proved are not affected by subsequent bankruptcy proceedings against him, which afford no ground for a stay of suits by them, nor are such suits barred by his discharge therein.—In re Spangler, U. S. D. C., 256 Fed. 62.

7.——Place of Contract.—Where personal property of the bankrupt, mortgaged in Illinois, was with consent of the mortgagees removed to Tennessee, and thence removed to Mississippi, and later carried to Arkansas, wherein the mortgagor was adjudicated a bankrupt, rights of the mortgagees and general creditors must be determined by the Arkansas laws.—In re Davies, U. S. D. C., 256 Fed. 52.

8.——Undisclosed Principal.—A judgment entered by consent on a complaint alleging that plaintiff as undisclosed principal paid defendant a certain sum for an interest in a land speculation, which was uncompleted because the land was not conveyed to defendant, is not a liability for obtaining property by "false representations," within Bankruptcy Act, and is barred by the discharge in bankruptcy.—Bowman v. Provident Realty Inv. Co., Cal., 180 Pac. 18.

9. **Banks and Banking** — Consideration. — Where one state bank illegally agreed to assume part of the liabilities of another insolvent state bank, there was no consideration legally sufficient to support a promise by the assuming bank to pay indebtedness due from insolvent bank to county, or to support check given as part performance.—Board of Com'rs of Lake County v. Citizens' Trust & Savings Bank, Ind., 123 N. E. 130.

10.——Depositor.—A bank having no previous dealings with a corporation and being unacquainted with its officers or their powers was not warranted in accepting a check payable to the order of such corporation bearing indorsement only of payee's name by its secretary and after collecting the check place the amount to the credit of the person presenting it, without inquiry as to his authority, and permitting him to withdraw the proceeds.—Buena Vista Oil Co. v. Park Bank of Los Angeles, Cal., 180 Pac. 12.

11.——Officer.—A bank officer who participates in settlement of business transactions as the personal business of himself and another stockholder, which business is in fact beyond the powers of the bank under Comp. Law 1913, § 5150, and who later gains control of bank, is estopped to use its corporate name to compel an accounting.—Security State Bank of Strasburg v. Fischer, N. D., 171 N. W. 866.

12.——Protest.—A bank, receiving a note for collection, which it forwards to its correspondent, owes no duty to see that the indorsers receive notice of protest, in the absence of instructions, if the holder receives notice of dis-

honor and protest.—Farmers' Nat. Bank of Beaver Falls v. People's Nat. Bank of Pittsburgh, Pa., 106 Atl. 311.

13. **Bills and Notes**—Acceptance.—The acceptance of a bill of exchange admits everything essential to its validity, and the acceptor cannot refuse payment for want or failure of consideration.—J. E. Smith & Co. v. W. H. Hurlburt Co., Conn., 106 Atl. 319.

14.——Seal.—That a note is under seal will not defeat the right of the maker, or his administrator, to plead want of consideration.—Brown v. Nichols, Ga., 99 S. E. 57.

15. **Carriers of Goods**—Conversion.—In an action against a railway for conversion of cotton, a judgment for plaintiff cannot stand, where there is no proof that the cotton was ever delivered to the railroad, or any evidence concerning the quality or weight of the cotton.—Texas & N. O. Ry. Co. v. Spencer, Tex., 210 S. W. 989.

16.——Initial Carrier.—An initial carrier giving a through bill of lading acts not only on its own behalf, but as agent for all the carriers through whose hands the shipment would pass, and obligates for itself and for them its safe delivery at destination.—Reidsville Paper Box Co. v. Southern Ry., N. C., 99 S. E. 23.

17. **Carrier of Passengers**—Wrongful Assault.—Though conductors of railway cars, both street and steam, cannot lawfully assault a passenger, their position and employment do not deprive them of the right of self-defense; and, if wrongfully assaulted, they have the same right of self-defense accorded to the ordinary citizen.—Wiard v. Dunham, Mo., 210 S. W. 873.

18. **Commerce**—Reparation.—Judgment should be for defendant, in an action on a reparation order of the Interstate Commerce Commission in favor of a consignee; there being nothing but the order and the record before the Commission, showing that, while it found the charge unreasonable, it made the order on the mere assignment by the shipper to the consignee of all its claims in the matter, after it had found that it clearly appeared that the shipper had paid no freight charge, and that there was no proof that the consignee had paid the excess.—Michigan Cent. R. Co. v. Elliott, U. S. C. C. A., 256 Fed. 18.

19. Conspiracy—Enlistment Act.—An indictment charging defendants with conspiring to teach and advocate that men should not enlist in the United States military or naval forces, and that citizens should not assist in prosecuting a war against a public enemy, does not, because it contains an averment that one of the defendants consummated the offense which they conspired to commit, charge the offense of so teaching and advocating as denounced by Laws 1917, c. 463, § 3, but is an indictment for conspiracy alone.—State v. Townley, Minn., 171 N. W. 930.

20. **Constitutional Law**—Director General of Railways—Order of Director General of Railroads (General Order No. 50), as to amending pleadings in pending actions and suits against any carrier company by substituting the director general as party defendant, outlines a course of procedure amounting to a denial of due process of law.—Vaughan v. State, Ala., 81 So. 417.

21. **Contracts**—Breach.—Where sub-contractor to do road improvement work, not only refused to pay a contractor to do hauling amount latter claimed to be due, but refused to determine with him the amount due, and pay him such sum as might be found due on the determination, as required, there was a breach of contract between sub-contractor and haulage contractor, entitling latter to cancel agreement.—Bishop v. T. Ryan Const. Co., Wash., 180 Pac. 126.

22.——Contingent Liability.—A grantor's liability on a subsequent agreement with his grantee to pay a judgment against the land is absolute, not contingent upon prior satisfaction of the judgment by such grantee.—Woods v. Bennett, Cal., 180 Pac. 25.

23.——Good Will.—Under Comp. Laws 1913, § 5929, it is only competent for seller of good will of a business to agree with buyer to refrain from carrying on a similar business within a specified county or city.—Strobeck v. McWilliams, N. D., 171 N. W. 865.

24.——Mutuality.—A contract for sale of peanuts at a stated price per bushel is unilateral and unenforceable, where the purchasers do not assume any obligations to accept or pay for the goods.—Burton v. Jernigan, Ga., 99 S. E. 56.

25.——Reasonable Time.—A contract, not providing for completion at any definite time, was to be completed in a reasonable time.—Fagerholm v. Nielson, Conn., 106 Atl. 333.

26.——Separate Writings—Two or more writings executed at same time by same parties relating to same subject-matter, one of which refers to the other and which are deposited together with a third party to await happening of a certain contingency, should be interpreted as a single contract.—Hudson v. Riley, Kan., 180 Pac. 198.

27.——Waiver.—Where one party to a contract repudiates it and refuses to perform, a tender by the other party is deemed to be waived.—Catlett v. Bloyd, W. Va., 99 S. E. 81.

28. **Corporations**—Acceptance of Benefits.—A corporation, whose officers knowingly accept benefit of services rendered by one assuming to act as its agent, and whose officers hold meetings, pursuant to agreements by such agent, to effect a lease of its property, is presumed to have employed person assuming to act for it as its agent.—Oberman v. Red Rock Fuel Co., W. Va., 99 S. E. 66.

29.——Directors.—The relation of corporate directors to stockholders is essentially that of trustee and cestui que trust, and the directors are bound to conscientious fairness, morality, and honesty in purpose, and held, in official action, to the extreme measure of candor, unselfishness, and good faith.—Kavanaugh v. Kavanaugh Knitting Co., N. J., 123 N. E. 148.

30.——Judicial Sale.—Where a corporate judgment debtor was insolvent, and had ceased to do business when execution was levied on its property, the judicial sale conveyed no title as against the rights of other creditors of the corporation.—Houston v. Shear, Tex., 210 S. W. 976.

31. **Courts**—Obiter Dictum.—Court's holding in distinguishing a case on the authority of which one of the parties was insisting upon a result different from that reached in the opinion is a part of the actual decision, and not merely obiter dictum.—State ex rel. McNulty v. Ellison, Mo., 210 S. W. 881.

32. **Covenants**—Building Restrictions.—A restriction in a deed that "no structure of any kind shall be erected or permitted upon said premises or any part thereof unless the plans for the same shall have been first submitted to and approved" by the grantor or his legal representative is a valid covenant running with the land, and inures to benefit of the other lot owners in a plan of lots in accordance with which the deed was made.—Harmon v. Burow, Pa., 106 Atl. 310.

33. **Criminal Law**—Continuance.—Application for a continuance because of absence of witness should be genuine and truthful, and should state as accurately as possible what witness would testify to.—Glascoe v. State, Tex., 210 S. W. 956.

34.——Cross-Examining Accused.—Even if it was improper for the prosecuting attorney to ask accused on cross-examination whether he was thrown out of two certain lodges for immorality, there was no error in admitting it over an objection that it was not admissible "for the reason that secret societies are not subject to the same sort of investigations as persons."—Koehler v. State, Ind., 123 N. E. 111.

35.——Notice of Presidential Proclamation.—The courts take judicial knowledge of the proclamations of the President of the United States.—Vaughan v. State, Ala., 81 So. 417.

36. **Customs and Usages**—Proof of Custom.—A good custom, invocable as tacitly affecting

a contract, must be definite and certain, well-established, uniformly and universally prevalent and observed, of general notoriety, and acquiesced in without contention so long and so continuously that contracting parties either had it in mind or ought to have had it in mind when contracting.—Jarecki Mfg. Co. v. Merriam, Kan., 180 Pac. 224.

37. **Deeds**—Name in Blank.—A deed delivered with the name of the grantee therein blank, with no proper authorization shown to fill in the name of the grantee, is void on its face.—Brugman v. Charlson, N. D., 171 N. W. 882.

38. **Divorce** — Accrued Installments. — Upon application to revise a decree in respect to alimony for support merely, the court in exercise of sound judicial discretion may cancel accrued installments as well as cut off further installments, as such alimony, even as to accrued installments, is not to be regarded as a vested property right.—Hartigan v. Hartigan, Minn., 171 N. W. 925.

39.——Alimony.—The obligation of a husband to support his wife is personal, and therefore an order for alimony, in effect a final judgment for money, is a judgment in personam, and void unless the husband has voluntarily appeared or been duly served with notice.—Reed v. Reed, Cal., 180 Pac. 43.

40.——Division of Property.—Property purchased by husband with money from estate inherited by him, and conveyed to wife during marriage in consideration or by reason of marriage and without a valuable consideration, will be restored to husband upon a divorce being granted him under Civ. Code Prac. § 425.—Dunn v. Dunn, Ky., 210 S. W. 943.

41. **Easements** — Prescription. — Permissive use of a private way not over 15 feet in width may ripen into prescriptive rights thereto.—Thomas v. Scott, Ga., 99 S. E. 57.

42. **Eminent Domain** — Damages. — Railroad over whose right of way a public road has been condemned is entitled to receive compensation for all damages that may be reasonably anticipated and ascertained, but is not entitled to the expense of installing and the cost of maintaining electric bell at the crossing; such bell being necessary as a safeguard against accidents.—Franklin County v. Missouri Pac. Ry. Co., Mo., 210 S. W. 874.

43. **Execution**—Inadequacy.—The sale for the sum of $85 of property of an admitted value of $85,000, but subject to valid and subsisting liens aggregating a sum considerably in excess of this value, would not warrant an equity court in nullifying the sale for inadequacy of price, where such liens must be paid to secure and enjoy good title to the property and as a condition of redemption.—Houston v. Shear, Tex., 210 S. W. 976.

44. **Forgery**—Authority to Sign.—Where defendant had authority from his father "to go and mortage the place" to procure money, the signing and acknowledging by defendant of mortgage in the father's name and indorsement of check representing loan for which mortgage was given in his father's name and also in his own name was not forgery.—State v. Petridge, Wash., 180 Pac. 150.

45. **Frauds, Statute of**—Growing Trees.—A sale of growing trees is within the statute of frauds, and must be evidenced by a writing.—Broderick v. McRae Box Co., Ark., 210 S. W. 935.

46.——Memorandum. — The memorandum exacted by the statute of frauds may be pieced together from separate writings, connected by express reference or internal evidence of subject-matter and occasion, and the writings need not be from promisor to promisee, but may be from the promisor to his own agent.—Marks v. Cowdin, N. Y., 123 N. E. 139, 226 N. Y. 138.

47. **Grand Jury**—Interpreter.—A statute authorizing the use of an interpreter before the grand jury in cases where a witness cannot speak English, or speaks it so deficiently as not to convey intelligible information, would not be unconstitutional.—In re Opinion of the Justices, Mass., 123 N. E. 100.

48. **Highways**—Guard Rails.—Municipality is bound to use ordinary care to construct guard rails, where their absence would leave the highway unsafe.—Camp v. Allegheny County, Pa., 106 Atl. 314.

49. **Husband and Wife**—Alienation of Affections.—In husband's action for alienation of wife's affections, criminal conversation may be pleaded in aggravation of the alienation of affections.—Sullivan v. Valiquette, Col., 180 Pac. 91.

50.——Antenuptial Contract.—An antenuptial contract must be upheld, unless fraud, deceit, or unreasonable inadequacy or disproportion appears, in which case fraud will be presumed, and the burden is on the husband or those claiming under him to show that the wife was fully informed as to his property.—Watson v. Watson, Kan., 180 Pac. 242.

51.——Community Property.—The husband is entitled to the exclusive management and disposition of the community estate during marriage, whch right continues and is likewise exclusive after the wife's death for the purpose of discharging the ordinary debts of the community estate; such power of the surviving husband overriding that of the wife's administrator.—Stone v. Jackson, Tex., 210 S. W. 953.

52.——Conflict of Laws.—In an action on a married woman's note executed and payable in the state of Arkansas, the laws of that state control.—Walker v. Arkansas Nat. Bank of Hot Springs, U. S. C. C. A., 256 Fed. 1.

53. **Injunction** — Irreparable Damage. — The remedy by injunction lies only to prevent general and irreparable mischief.—Strobeck v. McWilliams, N. D., 171 N. W. 865.

54.——Protecting Possession.—Though ordinarily a writ of injunction will not issue to change the possession of real property, one possessing realty for more than a year as owner, whether the real owner or not, may protect that possession by injunction.—Wemple v. Eastham, La., 81 So. 438.

55.——Threatened Prosecution.—As a general rule a court of equity has no jurisdiction to enjoin a threatened criminal prosecution, including prosecutions for violation of municipal ordinances punishable by fine and imprisonment.—Steinberg v. City of Savannah, Ga., 99 S. E. 36.

56. **Insurance**—Benefit Certificate.—Where a fraternal benefit life insurance certificate provided that, if insured should die "at any time by the hand of his beneficiary or beneficiaries" except by accident, the "certificate should thereby become null and void," and insured died from wounds inflicted by the beneficiary, who shot herself and died before insured, the policy became void, and insured's heirs could not collect under a certificate provision that, if beneficiary died before insured, payment should be made to insured's estate.—Markland v. Modern Woodmen of America, Mo., 210 S. W. 921.

57.——Change of Occupation.—The term "occupation," as used in a policy requiring notice to insured of change of occupation, means the usual business of insured, and "changing his occupation" means engaging in another employment as a usual business.—Union Health & Accident Co. v. Anderson, Col., 180 Pac. 81.

58.——Employers' Liability.—Employer's liability policy, stipulating that insurer at its own cost would investigate all accidents and defend all suits of which it had notice, obligates insurer on appeal from judgment recovered by employe to protect employer pending appeal by furnishing supersedeas bond.—Johnson v. Maryland Casualty Co. of Baltimore, Neb., 171 N. W. 908.

59. **Interest** — Foreign Judgment. — In this state a foreign judgment bears interest.—Stavrelis v. Zacharias, N. H., 106 Atl. 306.

60. **Judgment** — Non Obstante Veredicto. — Where plea sets up an immaterial issue, and the parties go to trial thereon, the trial court should either give judgment for plaintiff non obstante veredicto or grant a repleader.—People's Nat. Bank of Orlando v. Magruder, Fla., 81 So. 440.

61. **Landlord and Tenant**—Termination of Lease.—A lease of land with buildings thereon is not terminated by the destruction of the buildings, unless it is so provided by contract or by statute.—Hamer v. Ellis, Cal., 180 Pac. 30.

62. **Limitation of Actions**—Accrual of Action. —As against a seller's claim, not based upon express contract, the statute of limitations commenced to run from each and every delivery and acceptance of merchandise. — American Woolen Co. of New York v. Samuelsohn, N. Y., 123 N. E. 154, 226 N. Y. 61.

63.——Demand Note.—Action on a contract guaranteeing payment of a note payable on demand must be brought within six years from the date of the note.—Homewood People's Bank v. Hastings, Pa., 106 Atl. 308.

64. **Master and Servant**—Assumption of Risk. —An interstate commerce employe, of experience, who after refusal of a light, and without assurance of safety or a light forthcoming in a reasonable time, continues in the dark at the work of removing a metal platform from where it had been used as passageway between freight cars on parallel tracks, must be held to have assumed the risk.—Delaware, L. & W. R. Co. v. Tomasco, U. S. C. C. A., 256 Fed. 14.

65.——Change in Position.—Whether a change in duties of one employed as sales manager was in effect a removal from that position held a question for the jury.—Marks v. Cowdin, N. Y., 123 N. E. 139, 226 N. Y. 138.

66.——Emergency.—In an action for the drowning of plaintiff's son while assisting in moving driftwood, an instruction that, if he would have been saved if he had remained in the boat, but had jumped out when it appeared to him that it was more dangerous to stay with it than to leave it, such fact could not relieve defendant of liability, held not objectionable.—Brown v. Atchison, T. & S. F. Ry. Co., Kan., 180 Pac. 211.

67.——Safe Place to Work.—The master must provide a reasonably safe place for the servant to work, and exercise reasonable care to keep it in a reasonably safe condition.—Schilling v. H. Koppers Co., W. Va., 99 S. E. 75.

68. **Mechanics' Liens**—Concrete Work.—Where the nature of the concrete work contracted for is such as to require the use of forms to hold it in place while hardening, and the materials from which the forms are made are consumed in the process, such material comes within the definition of "materials to be used or consumed" in the construction of a building as contained in Code Civ. Proc. § 1183, and a mechanic's lien may be had on the structure therefor.—Consolidated Lumber Co. v. Bosworth, Cal., 180 Pac. 60.

69. **Municipal Corporations**—Street Collision. —Where there was a collision of automobiles at a street intersection, it cannot be said as a matter of law that the accident did not happen as stated by either party, solely from the respective positions of the automobiles after the accident; there being such a complexity of forces and resultants as to afford no idea where the two automobiles would go or what they would do.—Kroell v. Lutz, Mo., 210 S. W. 926.

70. **Names**—False Assumption of.—Where one falsely assumed name of another and entered into a contract in the name of such other person, there was no valid contract.—Morgan Munitions Supply Co. v. Studebaker Corporation of America, N. Y., 123 N. E. 146, 226 N. Y. 94.

71. **Negligence**—Imputability.—A guest in an automobile, having no control over the driver, is not responsible for his negligence.—Weidlich v. New York, N. H. & H. R. Co., Conn., 106 Atl. 323.

72. **Nuisance**—Test of.—In determining damages depending on question whether a nuisance is temporary or permanent, the test is whether the nuisance can be readily abated at a reasonable expense; if so, it is temporary; if not, it is permanent.—Chesapeake & O. Ry. Co. v. Coleman, Ky., 210 S. W. 947.

73. **Partnership**—Accounting.—In an action for partnership accounting, it was material and prejudicial error to refuse to give defendant's requested special charge that profits were to be determined only upon business transacted before the purchase of plaintiff's interest by another, such purchase being clearly indicated by the evidence.—Hannes v. Raube, Tex., 210 S. W. 985.

74. **Payment**—Mistake.—To entitle a plaintiff to recover moneys paid under mistake, he must show, not only that he has paid the money, but also that defendant's action in accepting or retaining it is inequitable and against conscience.—Lark Equity Exchange v. Jones, N. D., 171 N. W. 863.

75. **Perpetuities**—Restraint of Alienation.— The rule that it is against public policy to restrain one in the disposition of property in which none but himself has an interest has no application to, and does not avoid, bequest of property in trust to pay the income to named persons for ten years, when they are to take the corpus, as such provisions do not restrain alienation of the corpus.—De Ladson v. Crawford, Conn., 106 Atl. 326.

76.——Unlawful Accumulation.—Where a will directed trustees to invest a certain portion of the estate and expend such part of the income thereof as was necessary to educate two children of testator's deceased sister, portion of the income not so paid to be added to principal, and that at the death of the father, and after the children have reached the age of 25 years, the trust fund should be divided between them, such bequest did not create an unlawful accumulation within Act April 18, 1853 (P. L. 503), during the minority of either of the children.—In re Neeb's Estate, Pa., 106 Atl. 317.

77. **Quieting Title**—Cloud on Title.—The sale of lands upon an execution issued against the grantor of the person holding legal title will cast a cloud upon the title.—Murphy v. Riecks, Cal., 180 Pac. 15.

78. **Railroads**—Trespasser.—The duty of observing ordinary care to a trespasser on the track does not devolve upon railroad employes until his presence is known to them; but, where the circumstances are such that the employes are bound on a given occasion to anticipate trespasser's presence, they must exercise ordinary care to prevent injury.—Chattanooga Ry. & Light Co. v. Wallace, Ga., 99 S. E. 57.

79. **Sales** — False Representations. — Where sale of chattel was made for mutual benefit of seller and another, and was procured by false representations of one of them, active co-operation of the other, by statements inducing buyer to accept and rely on representations, constituted collusion.—Bice v. Nelson, Kan., 180 Pac. 206.

80.——Executory Contract.—When a contract for the sale of goods is still executory on both sides, notice by the purchaser to the seller that he will not accept and pay for them amounts to a breach of the contract.—Phillips-Jones Co. v. Blackstock, Hale & Morgan, Ga., 99 S. E. 48.

81.——Implied Warranty.—Where an article of personal property is sold by executory contract by particular description or name, there is an implied condition or warranty that it will be, when delivered, a merchantable article of kind and description sold.—Gorby v. Bridgeman, W. Va., 99 S. E. 88.

82.——Inspection.—Where goods are sold by sample, and selected and sold by the seller, the buyer has a right of inspection and verification before acceptance, and there is no acceptance until he has exercised or waived the right.—Levy v. Radkay, Mass., 123 N. E. 97.

83. **Specific Performance** — Insolvency. — Ordinarily, insolvency is not of itself a sufficient ground for the specific performance of a contract for the sale of personal property.—Union Co-op. Co. v. Adolfson, Neb., 171 N. W. 902.

84. **United States**—Misfeasance by Officers.— The government is not liable for tortious conduct, misfeasance, or laches of its officers or employes, unless its consent thereto is given by some act of Congress.—Vaughn v. State, Ala., 81 So. 417.

85. **Wills**—Lapsed Legacy.—It is a general rule that a legacy or a devise will lapse when the legatee or devisee dies before the testator. —Dunn v. Kearney, Ill., 123 N. E. 105.